United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7530

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be Argued by
JOSEPH CARDILLO, JR.

In the Matter of the Arbitration
-between-

PETROLEUM TRANSPORT, LTD.,
Owners of the IONIAN CHALLENGER,

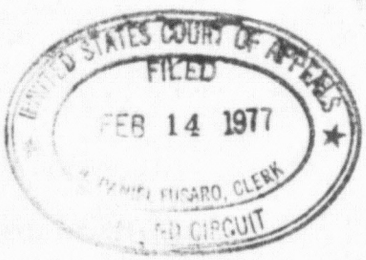
Petitioner-Appellant,

-and-

YACIMENTOS PETROLIFEROS FISCALES,
Charterers,

Respondent-Appellee.

REPLY BRIEF FOR APPELLANT



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-and- :

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Respondent-Appellee. :

REPLY BRIEF FOR APPELLANT

In its brief the appellee, Yacimentos Petroliferos Fiscales ("YPF"), tosses aside the issues and argues that the District Court's order should be affirmed because the appellant, Petroleum Transport Ltd., ("Petroleum") had ample opportunity to introduce evidence both with respect to the market rate and attorneys' fees.

The record shows that YPF's allegations have no basis in fact. Petroleum's opportunity to introduce evidence with respect to the market rates was affected by the fact that the attorney in charge of the case suffered a heart attack. (Appendix p. 17). As a result, both the release and analysis, by Petroleum's counsel, of the new evidence sought to be introduced before the arbitrators were delayed.

Nowhere in the record is there the indication or suggestion on the part of the arbitrators that the delay in seeking to present the new evidence was inexcusable or caused by negligence. On the contrary, the arbitrators' initial reaction to Petroleum's application was to order a further hearing -- a fact which YPF has completely ignored in its brief.

The above circumstances, the illness of Petroleum's counsel, Petroleum's timely application for a further hearing, and the arbitrators' initial grant of

that application distinguish the instant case from Shopping Cart, Inc. v. Amalgamated Food Employees Local 196, 305 F.Supp. 1221 (E.D. Pa. 1972), on which case YPF places great reliance, and in which it is stated that "the employer sought no continuance of the hearing".

YPF makes the argument at pages 7 and 8 of its brief that Petroleum's application was untimely because it was made after the award was made. This point is treated at length at pages 8 through 12 of Petroleum's main brief. Suffice it to state here that YPF's argument purportedly based on common English usage shows a confusion of terms. What logic and common English usage show is that although a decision may be made before an award is delivered to the parties, the award is not made until it is actually delivered. Consider the case where a decision is made by the arbitrators but an award is never delivered to the parties. Clearly in that case no award is made.

It is equally clear in the instant case that although the arbitrators may have made a preliminary decision prior to Petroleum's application for a further hearing, no award had been made or issued at that time.

Ironically, YPF in pressing its point that the award was "made" on October 10, 1975, argues at page 8 of its brief that "the Arbitrators then became functus officio." In that case, the panel did not have the authority to prepare and later deliver the "award" dated October 24, 1975.

The record also shows that Petroleum was denied the opportunity to introduce evidence with respect to attorneys' fees. The arbitrators released their so-called award while counsel for Petroleum were preparing a memorandum of law requested by the Panel of arbitrators themselves. Petroleum could not submit evidence with respect to attorneys' fees when its attorneys' work was still being performed at the direction of the Panel and when there existed the possibility that there would be at least two further hearings, one to present the new evidence and another previously requested by YPF to rebut that evidence.

Finally it should be noted that YPF has ignored in its brief the fact that the arbitrators' failure to quantify their award of attorneys' fees renders it voidable under Title 9 U.S.C.§10(d) which provides that an award may

be set aside when the arbitrators have so imperfectly executed their powers that a "mutual, final and definite award" has not been made.

The District Court erred in failing to rectify that defect and in failing to order the reopening of the hearings.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the District Court's Order be reversed.

Dated: New York, New York
February 11, 1977

Respectfully submitted,

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